

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MOTION HEARING

BEFORE THE HONORABLE CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

JANUARY 28, 2019

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1 (Proceedings commenced at 2:47 p.m.)

2 (The following proceedings were held in open court and
3 with the Defendants present.)

4 THE COURT: All right. Good afternoon. We're
5 continuing the hearing that Judge Noce just started. His part
6 of this hearing was the status hearing, and I'm here to talk
7 about the motion regarding lawful combatant status, but
8 because this is the first time I have been here or seen the
9 Defendants, I'd like to have everyone introduce themselves.
10 Let me start with the Government. Some of these people at the
11 Government table, I do not know. So, Mr. Drake, do you want
12 to tell me who's here on behalf of the United States?

13 MR. DRAKE: Matthew Drake, Your Honor. We also have
14 Howard Marcus, who you're familiar with. This is Josh
15 Champagne from the National Security Division in the
16 Counterterrorism Section. And Mr. Cichacki is the case agent
17 with the St. Louis City Metro Police Department, and he is
18 also a task force officer with the FBI.

19 THE COURT: And your -- what was his name?

20 MR. DRAKE: Joseph Cichacki.

21 THE COURT: Okay.

22 MR. DRAKE: I've given the spelling to the court
23 reporter as well.

24 THE COURT: Okay. All right. And then for the
25 Defendant, Ms. Dragan, would you -- just taking them in order,

1 if you would introduce yourself and cocounsel and your client.

2 MS. DRAGAN: Sure. Diane Dragan. We also have
3 Michael Dwyer and Kevin Curran here, and we represent
4 Mr. Hodzic, who is there in the front, standing up.

5 THE COURT: All right. Thank you.

6 And, Ms. Freter.

7 MS. FRETER: Kim Freter and Dan Schattnik. And we
8 represent Ms. Hodzic, who is also standing up.

9 THE COURT: All right. And, Ms. Trog.

10 MS. TROG: Your Honor, JoAnn Trog, and I represent
11 Mr. Rosic, and I just ask him to stand up.

12 THE COURT: All right. Thank you.

13 And let's see. Yes, Ms. Miller.

14 MS. MILLER: Your Honor, Joan Miller, representing
15 Ms. Medy Salkicevic. There's also Andrea Gambino who is not
16 present today.

17 THE COURT: Okay. And then, Mr. Swift.

18 MR. SWIFT: Good afternoon, Your Honor. Charles
19 Swift. My partner on this case, Catherine McDonald, is not
20 present today. We represent Armin Harcevic, who is present in
21 court and standing.

22 THE COURT: All right. Thank you.

23 All right. Obviously, this is Judge Noce's
24 courtroom. He's taller than I am. So I apologize for being
25 hidden up here.

1 What I wanted to hear today was your arguments on the
2 lawful combatant defense. I have studied everything and wish
3 to hear the legal and other arguments.

4 Have the defense counsel agreed on a way to divide up
5 this time?

6 MR. SWIFT: We have, Your Honor, and I will take the
7 argument for the defense.

8 THE COURT: All right. You can proceed.

11 THE COURT: Yes.

12 MR. SWIFT: Thank you, Your Honor.

21 The charged activity in this case is as foreign
22 fighters participating in an ongoing conflict in Syria. This
23 case is remarkably analogous to the original case decided by
24 the Supreme Court, and that's *United States v. Palmer*. In
25 that case, as the same as these cases, Justice Marshall found

1 that where a recognized civil war existed, that it would
2 violate neutrality to prosecute any act that would be
3 regularly convened under the laws of war, that is any
4 combatancy act, inside it.

5 It's important to note that at that time combatant
6 immunity was not generally enjoyed in civil wars.
7 Nevertheless, that was Justice Marshall's decision. It was a
8 consistent decision of the Supreme Court also in the Civil War
9 and most recently in the Mexican -- the U.S. Mex -- or --
10 excuse me -- the Mexico civil war at the beginning of this
11 century or the last century.

12 THE COURT: Those were all before the Geneva
13 Conventions; correct?

14 MR. SWIFT: That's correct, Your Honor.

15 THE COURT: And so the Government's position is that
16 the Geneva Conventions control and not the common law as you
17 are arguing.

18 MR. SWIFT: Right.

19 THE COURT: What's your response to that?

20 MR. SWIFT: The first part starts in the text. The
21 text is that Common Article 3 is a minimum, not a maximum. It
22 is the minimum that is to be provided, and it would take the
23 strange idea that the Geneva Conventions actually stripped
24 away rights, and they were -- actually, put forward greater
25 rights than had ever been before inside conflicts. They

1 weren't a reduction in rights. As the commentary cited by the
2 Magistrate and cited by us indicates, the nations couldn't
3 agree in the context of internal armed conflict or civil wars
4 or the like, in the part, so that we came up with a minimum
5 that everyone was willing to adopt, but nation-states were
6 free. Thus, under international law, remembering under our
7 principles of applying U.S. law, there is no conflict with
8 continuing to apply our higher standards. In fact, nations
9 were encouraged to do so in this context. So Common Article 3
10 does not strip away something. It didn't make lesser
11 protections. In fact, it extended protections for the first
12 time because, in many parts of the world, the idea that -- you
13 know, if there was a rebellion, you just simply killed
14 everybody who participated, without trial or without part on
15 it, and the attacks, et cetera, were well known. They tried
16 to alleviate some level of suffering, but they didn't. They
17 created a floor, not a ceiling, and the language and the
18 intent of the drafters is quite clear.

19 The second part on it is -- you know, part goes -- is
20 that this somehow changed our laws, and as I said, under
21 international law, our interpretation is it doesn't see how it
22 could possibly do so when it's so limited. The conflict here
23 is quite clearly inside the part our laws were to extend that.
24 Nothing in the Geneva Conventions says you shouldn't do that.

25 And so in our part on it, if you continue to follow

1 the -- if the Court follows as the Magistrate did, the
2 well-reasoned principles of both international law and our
3 interpretations of it and applies our law, which is what
4 you're directed to do under murder and maiming, then the
5 answer is what comes out.

6 And, you know, lastly, there's a strong policy
7 reason, as Justice Marshall observed at the very beginning.
8 Under the Government's theory, anyone fighting Assad and his
9 troops are criminals. They have to be. They're all criminals
10 in the eyes of the United States. The victim witness
11 statements come from Assad. This Court finds itself in the
12 very difficult position of prosecuting a war in which we are
13 on the -- somewhat on the opposite side, although during this
14 period of time, arguably, both maintaining neutrality in the
15 sense that we don't have troops on the ground and supporting
16 the other side, and one would find itself the strong policies
17 of Justice Marshall still kick in. There is no obligation in
18 this part under international law not to extend the
19 protections.

20 It's also -- when moving to the 9-11 cases, the
21 post-9-11 combatant immunities, this is clearly a different
22 situation than we faced in those other cases, Your Honor.
23 First off, starting with Afghanistan, one of the -- all of the
24 other cases differ in that we are a party to the conflict, and
25 if one applies in that part we're a party -- in other words,

1 we're participating. In Afghanistan, it's our troops on the
2 ground. In Iraq, it's our troops on the ground that are being
3 attacked. In those parts, I'd argue that in each one of the
4 cases where it came up, they were more of an insurgency than
5 an actual civil war, where we don't have two armies, per se,
6 in the field, as we did in Syria, on part, a Coalition set of
7 forces and the government forces.

8 More importantly, though, whether to extend the
9 protections in a civil war or in an insurgency where we're the
10 protections would be a policy decision case by case by
11 conflict. Where in this case, we aren't a party. We aren't
12 the people being attacked, and that's a significant difference
13 from all of the others inside the context here, Your Honor,
14 and its analysis.

15 And in fact, returning to Geneva, this conflict --
16 even the text of Common Article 3 wouldn't necessarily apply
17 to the United States in that part because Common Article 3
18 applies to those who are involved in the conflict, and there,
19 we are not during the relevant portions of the indictment. I
20 realize that the United States later put troops on the ground.
21 It changes the analysis, but we analyze it from there.

22 The next part is that where we start to disagree with
23 the Magistrate Judge comes into this idea of supporting
24 foreign terrorist organizations. We would sit there and say
25 that that phrase is just simply too unclear. What's clear

1 what's being charged is engaging in hostilities. What
2 "support" means -- and I think this is where we borrow wrongly
3 from 2339B instead of 2339A. Support in that could be in the
4 same coalition without being under the direct control of the
5 organization. Support associated within the context of the
6 Syrian War, where they're all fighting a common enemy, at
7 least during this period of time, is not meaningful to
8 disengage from the idea and say, well, this isn't -- we aren't
9 charging the Free Syrian Army. In fact, the Government was
10 quick to point out in its motion that we could charge the Free
11 Syrian Army. It doesn't matter.

12 Now, we also put forth, Your Honor, that this is a
13 jurisdictional issue. It was in *Palmer*. The Court's very
14 clear on that. In all the post-9-11 cases, the Court's very
15 clear on that. It's a jurisdictional issue, and the reason is
16 that lawful soldiers, you know, people who are engaging in
17 lawful acts of combat, aren't to be tried. On part. And when
18 we said in this part, even if one were to expect that there is
19 some potential that there's unlawful combat in here, the
20 problem is when we get to the grand jury, we don't know what
21 they indicted on given that phrase. Did they indict based on
22 the evidence that he participated in the Free Syrian Army and
23 the other organization, or did they indict based on he's
24 fighting under the direct command and control of ISIS? We
25 don't know, and from the affidavit or from the indictment, we

1 simply don't know what was the basis for the charge, the
2 underlying charges of murder and maiming based on Pazara's
3 conduct.

4 So we find ourselves in a part where, you know, we
5 can't really skirt it as a trial instruction because there's a
6 real possibility that the grand jury indicted on exactly the
7 same stuff that is now ruled out of bounds.

8 So we agree, you know, in large part with the
9 Magistrate's analysis of the issue that lawful combatant --
10 that combatant immunity has to exist here for the forces under
11 U.S. law or for the forces that we put forth evidence that
12 Pazara was with.

13 THE COURT: Well, do you think I have enough evidence
14 to rule that way? You're saying it should be jurisdictional
15 and I should dismiss the indictment; right?

16 MR. SWIFT: Yes, I do.

17 THE COURT: And it not be a trial issue, as Judge
18 Noce said?

19 MR. SWIFT: Right.

20 THE COURT: And so you think you've presented enough
21 evidence for me to rule on that as a final matter?

22 MR. SWIFT: Yes, we do, and the reason I say that is
23 we put forth affidavits, et cetera. We could -- we have the
24 potential for depositions coming up shortly, which you would
25 have then testimony on it, but we've proffered for that

1 evidence, and we're willing to call experts. We haven't been
2 afforded this opportunity. I think we've proffered sufficient
3 evidence that you could rule on, but we haven't been afforded
4 the opportunity yet to put that evidence on. We certainly can
5 do that inside the context of this. And we put forward that
6 once we do that, the burden shifts over to the Government.

7 The Government has taken the position that there's no
8 need for a hearing because such a hearing would not -- no one
9 in Syria has combatant immunity; therefore, it doesn't matter
10 what unit you were fighting with; it doesn't matter whether
11 you were wearing uniforms; it doesn't matter whether you were
12 generally complying with the laws of war and whether these
13 acts were specific to -- that their actions constituted
14 regular attacks or regular combatancy as described by then
15 Chief Justice Marshall. No one put out the idea, for
16 instance -- I think Justice Marshall's part was very important
17 in the process because, you know, again, if the evidence had
18 been that Captain Palmer had, you know, laid waste to civilian
19 populations, I don't think he'd have been in the same
20 position. You know, what we had after trial was that he
21 engaged in normal activities of war, which at that time
22 included seizing of merchant ships in the process under a
23 Letter of Marque.

24 So, yes, I feel that we've proffered sufficient
25 evidence, Your Honor. I do want to go back on part. There's

1 been no evidentiary hearing, and I would think that there
2 would be a need for an evidentiary hearing potentially.

3 Our concern is that -- you know, the overly broad
4 part two on this process inside the jurisdictional, and we
5 would point out, Your Honor -- and we've pointed this out in
6 our briefs in all these parts -- it has seemed to me from the
7 beginning that this is a 2339B case described as -- disguised
8 as a 2339A case. Many of the concerns that are laid out by
9 the Government on supporting this action or this group or some
10 part. On the modern battlefield, one finds many entities, and
11 that is not to say that the Government cannot say -- you know,
12 even maintaining neutrality -- sit there and say this
13 organization, if you give money to them, that's called
14 material support of terrorism under 2339B. There is a -- in
15 fact, the organization that Pazara was was later designated a
16 year or so afterwards, but that process existed throughout,
17 and it can look at changing norms on the battlefield, changing
18 conditions on the battlefield, and changing tactics, but 2339B
19 provides that part on it. It doesn't overly criminalize.
20 Instead of taking a sledgehammer and trying to slash -- smash
21 down, it allows with precision to isolate conduct that people
22 should know.

23 And you're stuck also here, Your Honor, with the part
24 where we find ourselves. Here we have the President, during
25 these periods of time, making these statements against Assad,

1 supporting these forces. The United States actually engaged
2 in support of them. But does a reasonable person in the
3 civilian population of the United States think that he can't
4 provide any support? No. When that organization is
5 designated as a terrorist organization, we have a long string
6 of law here, of case law, that the reasonable person knows
7 they cannot.

8 And so from our perspective -- and we've always said
9 this -- that nothing prevents the Government from addressing
10 the concerns they have of foreign terrorist organizations by
11 charging this as a 2339B case. It's not the all or nothing
12 that is perceived here or proposed here. Hardly. The
13 Government is not without remedies.

14 THE COURT: Let me ask you this. The Government
15 argues in its objections that the Fourth Circuit case that
16 came down changes things here because -- are there any cases
17 in -- in this or, I guess, in the last 100 years or so that
18 support your position? All the case law is the opposite;
19 right?

20 MR. SWIFT: Well, in the part I'm thinking, I think
21 Your Honor needs to take very clearly, though, all law of war
22 type parts, and I don't -- I disagree that the Fourth Circuit
23 case does because it's fact-specific, and you have to lie
24 inside fact-specific. It has been a long time since the
25 United States took a position inside a civil war. That's not

1 that unusual. Most of them occur a long way away from us and
2 don't involve us. So, you know, the part on this -- the part
3 is, okay, it's been 100 years, but we have been following this
4 sort of the case law, and I don't think that the Fourth
5 Circuit case in any way overrules the *Palmer* exception. You
6 could see on its face. If I had argued to the Fourth Circuit
7 *Palmer v. United States*, what would have they said?

8 Well, that was a foreign civil war which had been
9 recognized by the President, not an insurgency attacking us.

10 It would have been far different in their analysis on
11 the process, the part, where we find ourselves in a unique set
12 of factual circumstances that don't occur particularly
13 frequently but have been consistently handled in the same
14 manner.

15 And so part on the thing is that in this part is --
16 what the Government asks, Your Honor, is to criminalize on
17 part, and this has huge possibilities. At the onset of this
18 war, hundreds, if not thousands, of Americans, Syrian
19 Americans particularly, provided support to the Free Syrian
20 Army. Some years later, they now -- if the Government part is
21 on this -- to the legitimate forces, forces our own government
22 called the legitimate representatives of the Syrian people.
23 They're now criminals, whether indicted or not. It can't be
24 both ways on part.

25 So we sit here and say, you know, the Government

1 needs to charge with precision, and we don't believe that the
2 Fourth Circuit case in any way -- it's a far different matter.
3 Had these -- had this charge been he's with ISIS forces that
4 attacked a U.S. base that had been later established in Syria,
5 Fourth Circuit is dead on. That's not the facts here.

6 We would reserve the -- unless the Court has more
7 questions, I'll reserve the balance of my time.

8 THE COURT: That's all right. Okay. You may.

9 I'll hear from the United States.

10 MR. DRAKE: Thank you, Your Honor. May it please the
11 Court. I'd like to start with a review of some facts that the
12 parties agree on. Mr. Pazara, Abdullah Ramo Pazara, who was
13 the main conspirator who these Defendants are alleged to have
14 supported, was a Bosnian refugee. He was naturalized in this
15 very courthouse in May of 2013 by Judge Buckles. He became a
16 U.S. citizen. A week later, he left for Syria. He arrived
17 there by July of 2013. He joined a group of Bosnian
18 nationals, and they began to fight in the Syrian civil war. A
19 civil war, Judge. We all agree on that. And they fought
20 against the Syrian government. Within three weeks, he and
21 other Bosnians left that unit, and they assimilated into other
22 groups that were fighting in the region, and they continued to
23 do that through September of '14 when he was killed. Those
24 are the facts that we all agree on, okay, Judge, and those are
25 sufficient facts for you to make your ruling as a matter of

1 law on the issues that I'm about to talk about.

2 Now, there are additional facts and circumstances
3 that would come about, and I'll address those later about the
4 groups that Pazara actually fought for, but you don't need
5 those facts to make your ruling.

6 In our objections to the R&R, we argued that the sole
7 source of law for combatant immunity is the Third Geneva
8 Convention, particularly Article 2. When the U.S. ratified
9 that convention in 1949, it did so, and as the notes suggest,
10 it refined and codified common law. As a result, it
11 superseded all prior law and became the exclusive and
12 controlling source of legal authority concerning lawful
13 combatant immunity. In other words, there is no other source
14 of law for combatant immunity. Period. That's what
15 *Hamidullin* says, not as a fact question but as a question of
16 law.

17 And what the Defendants are asking this Court to do
18 is divert from precedent and extend the Geneva Conventions and
19 apply pre- or Civil-War-era common law or
20 pre-Geneva-Conventions common law and find that Abdullah
21 Pazara and his other insurgents that he fought with are
22 somehow entitled to the privilege of that immunity and
23 protection.

24 I would note, Judge, that we address in our brief
25 every district court, every appellate court, and the Supreme

1 Court have all used the Geneva Conventions as the basis for
2 evaluating lawful combatant immunity. No district court, no
3 appellate court, and no Supreme Court case addresses it under
4 this Civil-War-era common law matter, and I'll address some of
5 those cases later in my argument, Your Honor.

6 Let's be -- let's cover the ground here of what the
7 Geneva Conventions are. Basically, they make the fundamental
8 distinction between an international armed conflict and a
9 NIAC, a non-international armed conflict. There are two types
10 of legal status there -- persons who are detained in a NIAC --
11 and that's what the U.S. is generally participating in the
12 modern times -- non-international armed conflicts. Those
13 people are entitled to basic humanitarian protections, but
14 they are not entitled to combatant immunity in a NIAC, and it
15 should be that way because everyone should be treated
16 decently, Judge. If you're captured in a battlefield, you
17 should get certain minimum humanitarian protections, and I
18 will address the Court's question in just a moment on that
19 issue. But even though you should get minimum protections,
20 you should not be allowed to kill and murder.

21 There's a second matter that the Geneva Conventions
22 address, and that is an international armed conflict. That
23 happens between High Contracting Parties or nation-states, and
24 in that situation, if a soldier is captured, he or she becomes
25 a prisoner of war, and you have treatment as such, and you may

1 qualify for combatant immunity. So, in other words, the
2 provisions of the Geneva Convention apply during armed
3 international conflicts.

4 Because this is a civil war in Syria, this is not an
5 international armed conflict. It is a NIAC, a
6 non-international armed conflict. And as the Government has
7 argued, because it's not an international armed conflict,
8 under the existing law of the Geneva Conventions and every
9 other court that's examined it, that ends the analysis.
10 Period. End of story. As the *Hamidullin* court said, the
11 Geneva Convention's explicit definition of lawful combatant
12 status is controlling and conclusive. Now, second, Judge, if
13 the Convention's prisoners of wars protection apply to the
14 Syrian conflict, Pazara also wouldn't be entitled to
15 protections as a lawful combatant immunity participant because
16 he was not acting on behalf of a High Contracting Party.
17 That's what the Geneva Conventions require. He did not fight
18 on behalf of a state. He was a U.S. citizen, naturalized by
19 Judge Buckles, and went to fight in Syria along with his other
20 insurgent mates, Judge. Again, as a matter of law, based on
21 the facts that the parties have agreed to, the Court could end
22 its analysis there.

23 And I'd like to address *Hamidullin* for just a moment
24 and the effect it had. Judge Noce did not have the benefit of
25 that decision when he issued his R&R, but that is the law, and

1 all the other courts that the *Hamidullin* court refers to is
2 the law. While it might be slightly factually different,
3 we're talking about what the Court found as a matter of law,
4 and that is, I would say, very suggestive precedent for this
5 Court to consider. It is explicitly clear that the *Hamidullin*
6 court found that lawful combatant immunity must apply only in
7 an international armed conflict. It is the only path forward
8 for combatants to find that type of protection. It
9 explicitly, unequivocally rejected the idea of
10 pre-Geneva-Convention common law war, and it said exactly what
11 I told you a moment ago, that the Geneva Conventions
12 superseded all of that.

13 And, Judge, I have an exhibit which I could proffer
14 to the Court and will, and the defense, I'm sure, is aware of
15 it, but it is the -- I'll call it Government's Exhibit 1.
16 It's the Government's brief in opposition to certiorari, which
17 substantiates all of what I'm telling you here today, Judge.

18 THE COURT: And that's just pending decision on
19 whether they're going to accept cert; right?

20 MR. DRAKE: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. DRAKE: Yes, Your Honor.

23 And I'd like to talk about our facts in this case,
24 Judge. As I said, Pazara was a citizen, and he and other
25 nationals went to fight in the civil war. They were not a

1 member of a state, and the civil war was not an international
2 armed conflict, and this Court doesn't need to go any further
3 as far as the Government is concerned and as far as *Hamidullin*
4 is concerned and as far as every other opinion is concerned.

5 But I do want to go a step further and make something
6 clear. As the indictment points out, he fought for foreign
7 terrorist organizations, designated terrorist organizations.
8 The superseding indictment we're talking about is considering
9 alleging an offense that does that. I have an exhibit marked
10 Exhibit 2, 3, and 4, which I will proffer to the Court today,
11 Judge. Mr. Swift and the defense rely on a lot of media
12 reporting on the matter in support of their arguments in the
13 briefs, and Exhibit 2, which I would proffer to the Court for
14 whatever consideration it would give, is an *Atlantic* article
15 about Mr. Pazara's exploits -- this has all been provided to
16 the defense in discovery -- and how he participated as a
17 fighter for various foreign terrorist organizations.

18 The other one I would proffer, Judge, is what I'll
19 refer to as Government's Exhibit 3. It is a -- it is a -- my
20 copy for the Judge. It's a conversation between Mr. Pazara on
21 Facebook with an individual here in the United States, and in
22 that, he explicitly and clearly says, as early in the conflict
23 as April 22nd of 2013, that he has affiliated himself with
24 al Qaeda in Iraq. Okay. When asked later on in the
25 conversation, he also says, "I am fighting for Allah so we can

1 establish the Islamic State." He later says, when asked,
2 "Yes, I'm a Mujahideen. I fight for the Islamic State of Iraq
3 and Sham."

4 And it's not just what Pazara said, Judge. It's what
5 the Defendants knew and what the Defendants know. In
6 February, Mr. Hodzic, who is the principal Defendant in this
7 case -- and I would proffer Government's Exhibit 4, also
8 provided in discovery -- is seen wearing a shirt supporting
9 ISIS.

10 My point in this, Judge, is not to say that these are
11 facts you must rely on, but they're facts you could rely on,
12 and what I'm trying to draw the distinction for here is,
13 Judge, the absurd result would be -- is if somehow Pazara were
14 determined to be a lawful combatant who fought for a
15 designated foreign terrorist organization, we couldn't -- that
16 would be an absurd result. We couldn't get there because
17 that's what he did and that's what the Defendants knew. But
18 that's not what you need to find. You need to find only what
19 I was mentioning earlier, that it's a non-international armed
20 conflict and that he was not a member of a High Contracting
21 Party.

22 I'd like to address some of their arguments, the
23 defense's arguments, and I'll start with the minimum standards
24 that you mentioned earlier in your questioning, Judge. The
25 defense is basically arguing for an extension of the Geneva

1 Conventions and to say that the Geneva Conventions don't
2 prohibit the U.S. from granting lawful combatant immunity, and
3 they're right. They don't prevent it. That is true. It
4 doesn't prevent the U.S. President from granting combatant
5 immunity, and frankly, the President can immunize all manner
6 of crime. What the Third Geneva Convention and Article 3
7 provide is a minimum humanitarian treatment to prisoners in
8 non-international armed conflicts. We all agree about this.
9 It's possible that this phrase might suggest that states
10 should be encouraged to afford better than minimum standards,
11 like Mr. Swift was mentioning, care for the sick and wounded.
12 Everybody's fine with that, Judge. However, that's about the
13 treatment of prisoners. That's about treatment of those
14 captured on the battlefield, not their legal status. That's
15 why it doesn't apply -- lawful combatant immunity -- in those
16 minimum standards, and here's how we know that. Article 3
17 expressly states in its final sentence that these are minimum
18 standards that shall not affect the legal status to the
19 parties to the conflict. In other words, what it's saying is
20 we are asking you to consider additional standards for the
21 humanitarian treatment of people, not change their legal
22 status. In other words, the Geneva Conventions contemplated
23 something like this coming up.

24 Think about it this way, Judge. If the United
25 States -- if we follow their theory, if somehow the United

1 States were embroiled in some sort of fundamental crisis here
2 at home and, under the defense argument, when insurgents came
3 to the United States and took up arms in the conflict, it
4 would not be murder to kill as a legitimate act of war, even
5 in a civil war. Taken to its logical conclusion, what they
6 would really be saying -- if that rebellion happened here and
7 those people that started the rebellion gained ground and
8 happened to kill people in our country and the rebels had
9 enough territory to renounce the President and they asked
10 other people to come and join their cause, that somehow we
11 couldn't prosecute those people in this country. That's
12 ridiculous. That's an illogical conclusion. We absolutely
13 could.

14 You know what; Mr. Swift also brought up some
15 statements that the President made or the Government made
16 about the lawful combatant status of people, and I'd like to
17 address that. First of all, they've never argued public
18 authority defense. They're only arguing lawful combatant
19 immunity. The defense has said that by saying that some of
20 these combatants are lawful combatants or legitimate
21 combatants or what have you, maybe the Free Syrian Army or
22 whatever, that this somehow absolves people of liability in
23 this country if they supported them, and that's simply not
24 true. What those statements were were political statements,
25 Judge. They were not meant to confer legal rights on

1 individuals and nor did they do so, and the defense doesn't
2 cite anything that says that they do confer legal rights. In
3 fact, other cases such as *Hamidullin* and the other ones say
4 that they do not confer legal status, and they don't recite to
5 anything that says that it would, Judge.

6 I'd like to also address very briefly the *Prize*
7 theory of cases that they've talked about in their brief,
8 Judge. This is where they find their common law error stuff.
9 Now, I would urge this Court to say we don't need to go this
10 far. As I've mentioned, the Geneva Conventions are the law of
11 the land, and that's where we should stop our analysis.
12 However, I'd like to point out that no court has ever agreed
13 with the defense on this theory of common law
14 pre-Geneva-Convention-era combatant immunity. What the *Prize*
15 Cases were about was whether or not President Lincoln could
16 use his powers to repel an insurrection. He specifically was
17 talking or the Court was specifically talking about a blockade
18 of ships, the seizing of the ships, and the selling of those
19 ships. They were not about the exercise of criminal laws.
20 The Court found that it was President Lincoln's decision how
21 and when to exercise his authority under the law and what to
22 do, and the President did confer immunity to Confederate
23 soldiers in those cases; however, he did so and he did confer
24 POW status not because he had to or a court required him to
25 but because he chose to, Judge, and the *Ford* case that is

1 cited by the defense points this out. It says that United
2 States' sound policy and humanitarian reasons conceded to the
3 Confederates the status and rights as if they had been engaged
4 in war for an independent power. The Court didn't compel that
5 decision. That's a decision the President chose.

6 So if we go through the defense looking glass here,
7 Judge, and we accept their premise, the most important thing
8 that you need to think about with this portion of their
9 argument is -- think about this: Even if World War II never
10 happened, the Geneva Conventions were never enacted, we never
11 adopted the standards of the Geneva Conventions, and the legal
12 framework in 1860 existed still today under these theories, it
13 would be up to the President to immunize Pazara and the
14 insurgents in the Syrian civil war. The Presidents have not
15 chosen to do that, and they won't, and if they did, Judge, we
16 wouldn't be bringing this case, but that's what that theory of
17 cases and that line of cases talks about. It's about the
18 exercise of presidential authority, not the legal right of the
19 combatants that are at issue here.

20 Judge, I guess here's our point in a nutshell. We
21 believe that the defense is plainly wrong on the law, and we
22 believe *Hamidullin* is the controlling law on the subject
23 because it basically is a good summary of all of the laws on
24 the law, not the facts, but I think even under our facts, it
25 still controls. And the facts that the parties agree to.

1 And there is a menu and a host of reasons why the
2 Court could find as a matter of law that lawful combatant
3 immunity doesn't apply. First, as I mentioned, it's a
4 non-international armed conflict. Geneva Conventions require
5 that. Secondly, it could find -- this Court could find that
6 Pazara and the others that he fought with or who received the
7 support from the Defendants were not High Contracting Parties.
8 Third, I suppose if the Court were inclined, even if you went
9 down the defense -- in our opinion, humbly -- incorrect
10 political and legal interpretation of the law, Pazara and
11 those who received his support were not entitled to lawful
12 combatant status because the Presidents hadn't granted that
13 status to those type of combatants.

14 And I would invite this Court and encourage this
15 Court to join the Fourth Circuit and other district and
16 appellate courts that have addressed this issue and find that
17 lawful combatant immunity is not -- is not a matter that these
18 individuals should be entitled to receive as a matter of law.

19 Now, we've also addressed the need for an evidentiary
20 hearing. The Government could certainly put on all kinds of
21 evidence about the foreign terrorist organizations, the
22 designated terrorist organizations, and the like, and we can
23 address Mr. Swift's other issues, but our point to Judge Noce
24 was and our point in the objections to the R&R is based on the
25 facts that the parties agree to, this is a question of law for

1 Your Honor, not a question of the facts. You have sufficient
2 facts to make that determination. In fact, if you look at all
3 of the cases that have come before it on all the precedent,
4 all of the courts have decided this as a matter of law and as
5 a matter of the facts that were before the court that the
6 parties agreed to. There's been no need to submit this to the
7 jury or make jury -- have the jury make jury conclusions and
8 jury findings. This is something that Your Honor and the
9 Court can decide based on the facts that are before it, and
10 particularly, in this case, because we agree on the salient
11 and most important facts which control the Geneva Conventions'
12 application of law in this matter.

13 Barring the Court having questions for me, Judge,
14 I'll --

15 THE COURT: I don't think I do, but I would like your
16 exhibits that you've --

17 MR. DRAKE: Yes.

18 THE COURT: -- referred to.

19 MR. DRAKE: And just so you all know, I've got
20 copies.

21 MR. CURRAN: Judge, can I just show a set to the --

22 THE COURT: Yes.

23 MR. CURRAN: -- clients just so they know what we're
24 talking about? Do you have a set I can just hand them?

25 MR. DRAKE: Yeah.

1 MR. CURRAN: Here.

2 THE COURT: Yeah. Why don't you hand me that. Yeah.

3 That's for us.

4 MR. DRAKE: Your Honor, if I may, the last exhibit in
5 there, the one with the ISIS photo -- there's a Post-it on
6 there, and there's a minor child depicted on there. I'm not
7 intending those to be filed as an exhibit or anything like
8 that. If the Court were inclined to refer to them or file
9 them as an exhibit, I would probably request an opportunity to
10 redact the image. That's why I put the sticker on there.

11 THE COURT: Okay. That's good.

12 MR. DRAKE: Thank you, Judge.

13 MR. SWIFT: Addressing the most extreme the fastest
14 is the Court need worry not about somehow this becoming an
15 armed rebellion inside the United States would not constitute
16 an attack on lawful authority or treason or some part on it.
17 I'm in complete agreement with the Government part, but what
18 we need to go back to is *Palmer*, not to the --

19 THE COURT: Hold on just a second. Let's let
20 Mr. Curran finish talking to the clients.

21 Okay. Go ahead.

22 MR. SWIFT: And this needs to -- and this informs the
23 understanding of all parts on this, Your Honor, and the
24 difference on a party. Let's go back to *Palmer*. The United
25 States wasn't involved in the civil war in the Dutch Antilles.

1 We weren't. There was no way for us to give status to someone
2 down in that war. We'd have to be involved. What the Court
3 found there was that lawful acts of war weren't triable under
4 U.S. law. In the Civil War, we were involved, and that would
5 be a status, and that's part of the part that comes forward
6 through *Hamidullin*, that you have to give status in that part.
7 Let's understand this first third-party civil war, which falls
8 far apart on the ideas of both the Mexican *Toscano* and the
9 U.S. Civil War on how we treat -- or the original *Palmer*
10 case -- how we treat people in a civil war. Nothing in the
11 Geneva Conventions. Read the last line. A party involved in
12 the conflict. We weren't. This isn't a party involved.
13 Syria can't be told to give -- by the United States -- to give
14 combatant immunity. We can strongly urge it. We can urge the
15 parts on that. We can't require it under international law.
16 And if we were prosecuting this case under Syrian law, he'd be
17 right, but we're not. We're prosecuting it under U.S. law,
18 and under U.S. law, in a third-party civil war recognized by
19 the Executive -- and that need be all he do is recognize the
20 existence -- then combatant immunity applies for regular acts
21 of war. That's law. That hasn't been changed by any part,
22 not by Geneva and not by a part, and when one reads through,
23 you have to do "Okay. Does this apply?" Well, we're not a
24 party. It doesn't apply to us.

25 The most likely one is like *Toscano*, going all the

1 way back to previous international law treaties, many of which
2 remain in effect. We'd be -- we'd be obligated to hold
3 combatants to the other side, as we did, should they stray
4 into our territory, to remain neutral. We can't help.

5 But this is a unique situation, and that's what the
6 Court grapples with, and that's what the Magistrate Judge got
7 correctly. *Hamidullin* was just an extension of exactly the
8 same things that had been going on in Afghanistan in these
9 questions on the part. It wasn't groundbreaking. And so
10 inside that part on it, we urge this Court first to consider
11 the question -- I admit in awhile, but I've explained to the
12 Court why it doesn't come up -- that combatant immunity
13 necessarily has to apply here under the long standing of it.

14 And you know what? In all these law of war cases --
15 and I will humbly submit I've been involved in several of
16 them -- *Palmer* never came up. *Palmer* was uncitable. You can
17 search throughout the *Hamdan* decision or *Hamidullin*. Why?
18 Because it factually has nothing to do with it. And in
19 applying the situation, it wouldn't come up, and that's why
20 *Palmer* and *Toscano* apply here today.

21 A part -- the Third Geneva Conventions would not
22 require the Assad government to give nor would they require us
23 to give rebels in your own country. That's a policy decision
24 left solely to the executive. But when the executive has
25 recognized the state of a legitimate war, what Marshall wisely

1 said -- and it holds as true today -- and the Court doesn't
2 take sides between the combatants for lawful acts of war. Of
3 course, war crimes, any war crime, or directly fighting for a
4 terrorist organization -- that could be charged and put forth.
5 To the extent that the Government now tries to put on factual
6 parts, we'd sit there and say we'd need a factual hearing on
7 the part because, as they say, their argument really at this
8 point lies in the fact that it's a civil war.

9 And what this Court is being asked to do is overturn
10 a case that has not been on part and a precedent in the
11 historic part of this Court, and we say if you stay with what
12 the law always was, you'll be right. Thank you, Your Honor.

13 THE COURT: Thank you.

14 Ms. Dragan.

15 MS. DRAGAN: Your Honor, could I just have one moment
16 to put into perspective a little bit? That was a lot. I mean
17 when we initially decided to pull out this issue and both
18 parties agreed to litigate combatant immunity in advance,
19 obviously our clients believed that they have combatant
20 immunity. The Government wanted that issue resolved. The
21 initial motion was filed all the way back in July of 2017.

22 And I think if the Court were to agree with Judge
23 Noce that you can have combatant immunity in a non-civil -- in
24 a non-international civil war, which is his holding, and agree
25 with -- and I don't think the Government opposes -- and I'm

1 sure they'll jump up in a minute if they do -- that combatant
2 immunity is a jurisdictional issue. If you have -- if the
3 person has combatant immunity, we're not trying them. So if
4 we agree with Noce that there is non-international combatant
5 immunity and that combatant immunity is a jurisdictional
6 issue, it can't be a jury question. So it is something that I
7 think that the Court either -- if you're going -- unless
8 you're going to rule for the Government, I think there
9 probably does need to be an evidentiary hearing, which is
10 where the parties kind of all thought this may go at the very
11 beginning and figure this out in advance of trial. So I think
12 that's the only disagreement we have with Noce's ruling is if
13 you can have a combatant immunity -- combatant immunity in a
14 non-international civil war, then you can't have that as a
15 jury issue. If they're combatant -- if they have combatant
16 immunity, they should never be tried. So I think that that's
17 kind of where we disagreed with Judge Noce, and I just didn't
18 want all that to be lost in everything that you heard today.

19 THE COURT: Mr. Drake.

20 MR. DRAKE: Yes, Judge. I'll address that very
21 briefly. So on -- let's see here. In the very last page of
22 Document #444, very last two pages, the Government's addressed
23 this issue. I will tell you this. No court has ever gotten
24 as far as -- I agree in part with what Ms. Dragan is saying
25 and I disagree in part. No court has ever gotten this far

1 because no court has ever found that lawful combatant immunity
2 applies in this context that we're talking about. So we
3 haven't had to make a determination of what is or is not
4 presentable to the jury.

5 Furthermore, it's called an affirmative defense, but
6 that's not how the cases have been resolved. It's really been
7 resolved more of the way that she was speaking of initially
8 and the way that Mr. Swift has spoken of, which is if
9 combatant immunity applies, then the combatants are immune
10 from prosecution; therefore, the Government cannot prosecute
11 them.

12 And our argument in the brief, in the last pages of
13 our brief, was while we don't -- while we don't know what the
14 answer to that question is -- affirmative defense, truly
15 immune from prosecution -- we don't need to get there because
16 the facts are sufficient that you can find that combatant
17 immunity does not apply based on my earlier arguments.

18 So I respectfully disagree with Ms. Dragan that we
19 need an evidentiary hearing. I think you have enough evidence
20 to decide, and I think it's a question of law.

21 Now, if you were to decide in some other way that
22 I've not foreseen, I guess, potentially, we would need one,
23 but we don't, as the Government, foresee that need.

24 THE COURT: Actually, this is a question for both you
25 and Mr. Swift. Mr. Swift, these depositions or this one

1 deposition or two depositions that you're getting ready to
2 take --

3 MR. SWIFT: Yes.

4 THE COURT: -- are those -- those -- are those
5 necessary to your case on the merits as well as on the --
6 they're not just limited to the combatant immunity issue;
7 right?

8 MR. SWIFT: They are necessary also from my
9 perspective of my client because I think in the original set
10 of briefing the Government agreed that, at least as far as
11 providing support to Mr. Pazara, that he had to utilize that
12 support for fighting, that if he used the support, for
13 instance, for buying humanitarian relief aids, that that would
14 not constitute material support of murder and maiming abroad.

15 THE COURT: Well, so my question is really not so
16 much give me your whole legal arguments and factual arguments.
17 It's more --

18 MR. SWIFT: Yes.

19 THE COURT: -- you're still going to want to take
20 these depositions --

21 MR. SWIFT: Yes.

22 THE COURT: -- even if I rule against you on this
23 combatant immunity?

24 MR. SWIFT: Yes, although I do believe that they are
25 central to -- I would still have a defense on the part of his

1 activity, his humanitarian activities while overseas.

2 MR. DRAKE: The Government's position is that even if
3 you were to rule against the Defendants on combatant immunity,
4 we would still join in the deposition because the defense has
5 asked for it and it might be central to whatever their factual
6 defense is at trial. The matters that I spoke to the Court
7 about facts that we agree on are at least in part encompassed
8 on the statements from the witness that is to be deposed that
9 the defense has already taken. In other words, what happened
10 during the first three weeks that Mr. Pazara was overseas. So
11 the facts that could be gleaned that are relevant to this
12 proceeding, I think, we're in agreement about.

13 THE COURT: Right. And I thought that's what you
14 were going to say, but I just wasn't positive, so I wanted to
15 make sure I was right about that.

16 Okay. Well, I will continue to take this under
17 submission, but I do expect to rule on it soon. I can't say
18 when, but I hope soon. So that's what we'll do.

19 So the Defendants are remanded to custody -- those
20 who are in custody. The others are released on their existing
21 conditions of bond and pending your further hearing, and
22 court's in recess.

23 MR. DRAKE: Thank you, Your Honor.

24 THE COURT: Thank you, all.

25 (Proceedings concluded at 3:36 p.m.)

CERTIFICATE

I, Gayle D. Madden, Registered Diplomate Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 36 inclusive.

Dated at St. Louis, Missouri, this 17th day of March, 2019.

/s/ Gayle D. Madden

GAYLE D. MADDEN, CSR, RDR, CRR

Official Court Reporter